United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7078

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELLA I. MEIJER-OOSTERINK,

Plaintiff-Appellant,

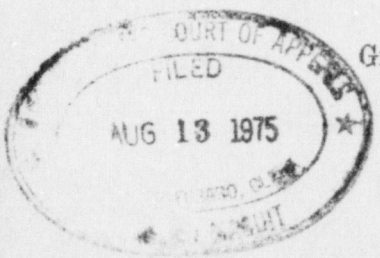
against

ESSO STANDARD EASTERN, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF ON BEHALF OF DEFENDANT-APPELLEE



GEORGE A. BURRELL,
Attorney for Defendant-Appellee,
220 Fifth Avenue,
New York, N.Y. 10001

2

TABLE OF CONTENTS

Cases Cited

Statutes Cited

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELLA I. MEIJER-OOSTERINK,

Plaintiff-Appellant,

against

ESSO STANDARD EASTERN, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

---

BRIEF ON BEHALF OF DEFENDANT-APPELLEE

Appellant appeals from a decision and judgment dismissing the complaint, after a non-jury trial, before the Hon. Charles M. Metzner.

The action is brought by appellant for reinstatement as an employee of defendant-appellee and for back pay on her claim that she was discriminated against because of national origin in violation of the provisions of Title

VII of the Civil Rights Act of 1964 (42 U.S.C. ¶2000 (e) et seq.).

The appellee, hereinafter referred to as Esso, denied any such discrimination.

The appellant poses eleven alleged issues which Esso contests on the basis that the alleged issues as posed are not in any way presented by the record. The appellant's statement of issues encompasses facts not found, or even referred to in most instances, in this case.

The issue before this Court is—was the District Court finding of no discrimination against the weight of the evidence?

Statement of Facts

No record on appeal has been served in this case nor has there been obtained any transcript, so that we are unable to supply reference pages.

The appellant became employed on May 16, 1963 by defendant-appellee as a group secretary, classification number 10. She was employed until October 31, 1967.

In seeking such employment, appellant requested "I would be unable to consider a position which would entail regular overtime work". This request was honored during the entire period of her employment.

In making the request, the appellant set forth various personal reasons including her marital problems.

The appellant worked in the Economic Coordination Department/Finance and Planning Department. The other persons employed with her, salaries, increases during the entire period were set forth for comparison purposes at the trial, as follows:

ESSO EASTERN INC.

ECONOMICS COORDINATION DEPARTMENT/FINANCE & PLANNING DEPARTMENT
SECRETARY SALARY SUMMARY 1964-67

	M. Bratland	*E. Meier*	*K.C. Dow (Lehan)*	*J.K. Lee*
1964				
Salary Group	10	10	10	
Position Title	Group Sec.	Group Sec.	Group Sec.	
Salary 12-31-63	525	450	400	
Increases during 1964	11	9	50 and 9	
Salary 12-31-64	536	459	459	
1965				
Salary Group	10	10	10	
Position Title	Group Sec.	Group Sec.	Group Sec.	
Salary 12-31-64	536	459	459	
Increases during 1965	34	36		
	[illegible]	22	21	
Salary 12-31-65	[illegible]	517	480	
1966				
Salary Group	[illegible]0	10	8	
Position Title	Group Sec.	Group Sec.	Sr. Sec.	
Salary	596	517	480	
Increases during 1966		43	60	
Salary 12-31-66	596	560	Resigned 6/30/66	
1967				
Salary Group	10	10		10
Position Title	Group Sec.	Group Sec.		Group Sec.
Salary 12-31-66	596	560		383
Increases during 1967	—	—		17
				55
Salary 12-31-67	596	560 Terminated Oct. 31, 1967		455

In 1966 appellant took a computer programing course, two-thirds of the cost of which was paid for by Esso. She scored in the low "B" range upon completion of that course and was advised that due to the very few openings in that program, only those who scored in the "A" range could qualify. She was urged at the same time, and at future times, to retake the computer programing test which she did not do.

In January, 1967, at the request of the appellant, she was referred and interviewed for additional openings with the parent company but again the appellant refused such employment because of the possibility of overtime work.

In August, 1967, the appellant complained about her fellow employees, alleging a clique of Roman Catholic employees who were rude to her and a feeling against her as a foreigner and other alleged criticism. Company representatives met with her within days after her communication to review with her all her complaints. Her salary record was examined in relation to others in her group and agreement reached was that she was being fairly treated. She was advised that she would be encouraged to fill openings with the company including the computer programing work if she could qualify for those jobs. She had at that time no explanation as to why she had not retaken the computer programing test. There was also discussion as to the restriction that she herself had placed upon her employment by insisting upon no overtime whatsoever, which the company respected. Her charges in connection with discrimination on the basis of religion and nationality by other employees were also reviewed but she was unable, as she had been unable to date, to specify any instance or name to support those charges.

About that time appellant raised the pospect of taking time off to pursue a college education at company ex-

pense. She was advised that the company would not be able to give her time off for daytime study at company's expense and that any application for educational refund to part-time study was related to the usefulness of the proposed education for job advancement; that studies in computer programing field are in the educational advancement plan and that she had already been reimbursed for such a course; but was encouraged to renew and retest.

In September, 1967 appellant again brought up the prospect of educational leave of absence for one year, stating at that time that because of her late application date she would apply for the February semester.

On September 28, 1967 she was advised verbally that her request for educational leave of absence had not been approved. Despite such instruction, on September 28, 1967 she wrote: "As I have not received any signed statement to the contrary I shall go on educational leave of absence as per October 1st."

By letter dated September 29, 1967 the appellant was informed in writing that her request for educational leave of absence was not approved.

In early September, appellant had been offered another job opportunity with the company. She refused to set up an interview date for such job opportunity stating she was not interested; that she was only interested to begin a one year educational leave of absence commencing October 1, 1967, although she had written she intended to apply for the February semester.

In any event she did not show up for work in October 1967.

On October 4, 1967, she was called at her home and asked when she was coming to the office. Appellant replied that she had no intention of coming to the office.

On October 13, 1967, by registered mail, a letter was sent to appellant stating: "Your absence from work since October 2, 1967 indicates that you have not accepted the company's decision that it was unable to grant your request for an educational leave of absence. We urge you return to work by October 17, 1967. If you do not return to work by this date, this letter will then constitute notification that your employment is terminated."

The appellant replied by letter dated October 17, 1967 charging a "conspiracy * * * Catholic group banding together and pushing out others regardless of seniority and ability". The letter further contained other irresponsible statements and threats.

The appellant was requested to appear in an effort to point out that her actions left no alternative to the company and also to point out that by her actions she was prejudicing her own interests, but she refused to reconsider and return to work.

On October 19, 1967 a letter was written to appellant stating: "I believe it desirable to confirm our conversation of Tuesday afternoon." The letter went on to say that it was concluded that for the best interests of all concerned to discontinue "your association with the company * * *". The letter further informed her that she would be continued on the payroll of the company until the end of October, 1967 "if no opportunity for transfer develops within that period of time we will consider your employment with the company to be terminated, and as assistance to you, will make available in a lump sum an amount equivalent to approximately 11½ weeks of pay."

She was also advised to inquire with reference to the benefit program as well as any other funds or rights she may have had under the company's benefit plans.

She failed to return to work and accepted the payment of $1500.00. Thereafter she appeared at the company's

office to conclude and sign off other company benefits. She executed all the necessary documents coincidental thereto.

Thereafter, the company received requests from prospective employers concerning appellant, to which response was made indicating that her reason for leaving was "to continue her education" and if a suitable opportunity was available she would be considered for re-employment.

In February, 1970, fully two and a half years after her termination, she filed written charges with the New York State Division of Human Rights making the same charges which she alleged in the complaint. A copy of such complaint with the New York State Division of Human Rights was marked as an exhibit at the trial.

On April 23, 1970 her complaint was dismissed by the New York State Human Rights Commission. At her request such dismissal was reviewed on an executive level and on October 1, 1970, it was ordered that "the determination of lack of probable cause to credit the allegations of the complaint is amply supported and I hereby deny the complainant's application for reopening."

Whereupon the New York State Division of Human Rights was attacked by plaintiff. Witness her answers to the interrogatories in which she states: "Plaintiff doubted whether any serious investigation was done (no sworn depositions were taken; no records requested) and since shortly thereafter some Commissioners were replaced (for very good reasons) she sent the EEOC copies of all her papers but did not file written charges under oath with them since this should have been done much earlier".

Application to the Equal Employment Opportunity Commission was refused by letter stating "we cannot help you at this time because the charge must be filed

within 210 days after the alleged unlawful practice occurred. Therefore the Commissioner has no jurisdiction over the matter". (Part of Exhibit C attached to interrogatories).

The summons in this action was drawn on March 15, 1971, fully a year after the Equal Employment Opportunity Commission had denied any jurisdiction to take this matter.

ARGUMENT

It would be impossible to attempt to discuss this case on the basis presented by the appellant in her alleged memorandum. Said memorandum is almost completely apart from any record except in her diatribe against various individuals who have nothing whatsoever to do with any of the alleged complaints made by the appellant in this action. Statements made therein are wholly apart from the record and are contrary to the record.

Under the circumstances we can only respectfully urge that:

(1) the appellant has not made out a prima facie case;

(2) The appellant has failed by reasonable periods of time to apply with the time period as set forth in the Equal Employment Opportunity Act, or any State act concerning civil rights;

(3) Findings that there had been no discrimination on previous applications to various governmental agencies should be given considerable weight.

(4) Plaintiff has failed to establish any discrimination by defendant;

(5) Plaintiff is not entitled to a jury trial.

POINT I

The allegations of the complaint are based solely upon unsupported statements made by the appellant, specifically denied by the defendant-appellee and which denials are supported by documentation showing no discrimination. On such basis appellant has failed to carry the burden of proof to establish a prima facie case.

The action arose in New York and under New York law more than mere allegations are necessary to support the burden of proof as herein involved.

Whitely v. *Lobue,* 24 NY 2d 896

Under the Federal Rules of Evidence the burden of proof must be carried by plaintiff by a preponderance of the evidence, that evidence being clear and convincing. We respectfully submit there is no such evidence in this case.

United States v. *Feinberg,* 140 Fed. 2d 592 (2nd Circuit NY) cert. denied 322 U.S. 726

POINT II

The appellant has failed by unreasonable periods of time to comply with the time periods set forth in the Equal Employment Opportunity Act, or any State act concerning civil rights; that by reason thereof appellant is barred from proceeding with this case.

It has been stated time and time again, that as a jurisdictional prerequisite for the institution of a civil action pursuant to the Civil Rights Act of 1964, the aggrieved person must file charges within 90 days after the unlaw-

ful practice is alleged to have occurred (Section 706 (D), USCA 2000 -5 (d).

There are further provisions in those same sections which provide for applications to state agencies as may be available prior to the institution of an action in the Federal Court but under any circumstances here all of the time limitations have been excessively violated.

In this case, two and a half years elapsed after termination before any such application was filed. The state governmental agency allowed as much as one year for the filing of any alleged discriminatory practice. None was so filed.

The Equal Employment Opportunity Law provides that after determination of any such charge or complaint action must be brought to the Equal Employment Opportunity Commission within 30 days after receiving the notice that the state has concluded or terminated its proceeding. As pointed out, the state order dismissing the complaint was made on April 23, 1970. No complaint was filed with the Equal Employment Opportunity Commission. On February 11, 1971, we have a letter from the Equal Employment Opportunity Commission commonly referred to as "Notice of Right to Sue within 30 days". But the Equal Employment Opportunity Commission rejected this claim on the ground that the plaintiff had failed to file any complaint with it within the time limitations provided by the Act.

Not only are the provisions of the act clear and specific as to time limitations but our District Courts throughout the country have reaffirmed the language of the statute by decisional law.

For example, in *Cox* v. *United States Gypsum Company,* U.S.D.C. Indiana, 1968, 284 F. Supp. 74, the Court states, at page 76:

> "Title 42 U.S.C. §2000e-5(d) also provides" '' charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred'.
>
> "Although the Courts disagree on many aspects of this act, there is one point on which they all agree. No civil action may be maintained unless the aggrieved party has first filed a charge against the defendant before the Equal Employment Opportunity Commission, and the charge is filed within ninety (90) days of the alleged discrimination. *Mickel* v. *South Carolina State Employment Service,* 377 F. 2d 239 (4th Cir. 1967); *Bowe* v. *Colgate Palmolive Co.,* 272 F. Supp. 332 (S.D. Ind. 1967); *Moody* v. *Albemarle Paper Co.,* 271 F. Supp. 27 (E.D. N.C. 1967); *Mondy* v. *Crown Zellerbach,* 271 F. Supp. 258 (E.D. La. 1967); *Anthony* v. *Brooks* (N.D. Ga. 1967); *Quarles* v. *Philip Morris,* 271 F. Supp. 842 (E.D. Va. 1967); *Dent* v. *St. Louis-San Francisco Ry.,* 265 F. Supp. 56 (N.D. Ala. 1967); *Hall* v. *Wertham Bag Corp.,* 251 F. Supp. 184 (M.D. Ten. 1966). Any other rule would be clearly inconsistent with the language of the act."

In *Choate* v. *Caterpillar Tractor Company,* U.S. Court of Appeals, 7th Circuit, 1968, 402 F. 2d 357, at page 359, the Court stated:

> "The requirement that a complainant must invoke the administrative process within the time limitations set forth in section 706 (d) is a jurisdictional precondition to the commencement of a court action."

See also:

Boudreaux v. *Barton Marine Contracting,* 304 F. Supp. 240

We might point out that in none of the cases cited was there such a lapse of time between the alleged grievance (which could not go beyond October, 1967) and the action taken by the plaintiff herein.

The fact is that there was no complaint or any document filed for approximately two and a half years. Even beyond that, every provision regarding time limitations imposed by the act was not complied with—not even close.

There is ample support for this doctrine from the Court of New York.

See:

Munger v. *State Division of Human Rights,* 32 App. Div. 2d 502, 305 N.Y. Supp. 2d 407
Romano v. *Romano,* 19 N.Y. 2d 444

Under any rule of law therefore it would appear that the appellant has not abided by any condition precedent as far as any prescribed time limitation is concerned.

POINT III

The findings of the State Division of Human Rights should be given considerable weight to any determination made herein.

New York State has established a State Human Rights Commission. Appellant elected, albeit untimely so, to place here charges before said Commission. Those charges which were submitted in 1970 were responded to, inquiry was made and the appellant appeared before the Commission in connection with those charges. Determination was made dismissing her charges to which the appellant made protest, seeking a review. The matter was thereupon re-

viewed by the Executive Department of the Division of Human Rights and an order was made that: "the determination of lack of probable cause to credit the allegations of the complaint is amply supported and I hereby deny the complainant's application for reopening." This was signed by Robert J. Mangum, Commissioner.

Under New York State Law such a determination would not be set aside by any Court unless it was found to be arbitrary and capricious. There has been no showing in any allegation made by the appellant herein to indicate in any way that such determination was arbitrary or capricious. The same matters that are being presented here were fully reviewed by the Division of Human Rights. The District Court evidently agreed with the findings by the State agency.

In view of these determinations, mere allegations all of which are self serving, illusory and unsupported, is insufficient to raise any issue that these finds are arbitrary and capricious or even against the weight of the evidence.

POINT IV

Appellant has failed to establish any discrimination by defendant-appellee.

Defendant-appellee is confined to a negative position in that we can merely reiterate denials of any discrimination of any nature against the plaintiff.

Appellant has not set forth with any specificity any acts or conduct supporting her general allegations of discrimination.

Appellant alleges she was not properly compensated. The record shows that she received periodic raises in her grade.

Appellant complains that she was required or requested to do more than her share of the work. The record shows that she insisted upon a position with no overtime; that she was employed with that provision. There is no complaint that she was ever asked to work overtime nor that she did.

Appellant complains of discrimination in that she was refused transfer. But documents submitted by her establishes that transfers were offered but she would not accept those transfers because they might require overtime work.

POINT V

Appellant was not entitled to a jury trial.

See: Section 42 U.S.C.A. Section 200E-5 (g):

> "If the *court finds* that the respondent has intentionally engaged in or is intentionally engaging in any unlawful employment practice charged in the complaint, *the court may* enjoin the respondent from engaging in such unlawful employment practice, *and order such affirmative action as may be appropriate,* which *may* include reinstatement or hiring of employees, with or without back pay * * *". (Emphasis supplied).

See also:

Culpepper v. *Reynolds Metals Company* (1968) 296 F. Sup. 1232

The fact that elimination of discrimination in employment is tied in with a money claim does not in and of itself make the issue properly triable before a jury.

See:

Wirtz v. *Jones,* 340 Fed. 2d 901 (5th Circ. 1965);
Jenkins v. *United Cities Gas Corp.,* 400 F. Sup. 28 at 32 and 35 reversed 261 F. Sup. 762;
Newman v. *Piggy Park Enterprises Inc.,* 300 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 1263 (1268)

The Court stated in *Culpepper* v. *Reynolds Metals Company, et al.*

> "The duty of the Court to enjoin discrimination where it finds unlawful employment practices to exist is unravellably interwined with the resulting money loss to a particular employee. Unequal opportunity in job classifications and in promotions, the establishment of new seniority lists, dealing with historically segregated departments, the equalization of pay in separate job classifications but comparable work—in all of this a jury is at best ill-equipped to make determinations of so sophisticated issues involving so complicated computations.
>
> "Hayes v. Seaboard Coast Line Rd. Co. supra.
>
> "Accordingly, plaintiff's motion to strike defendant's demand for a jury trial is granted."

CONCLUSION

Appellant has only submitted vague allegations of inequality of her treatment and these were not substantiated at the time of trial.

Appellant submitted various excuses for her termination but the record shows that she failed to come to work from pure pique because there was no company policy by which appellant could attend school at company ex-

pense merely because she asked for it. The record shows that there was correspondence in connection with this and that during the month of October, 1967 when she refused to go to the office, she was requested by letter to return to work, which she refused to do.

It is a fact that she was paid all during the month of October 1967 while she did not attend at work. When pursuant to notice her employment was terminated on October 31, 1967 she was sent, received and deposited a check representing $1,500.00. In addition, she was requested to communciate with persons connected with the Pension Plan which she did in order to effectively terminate her employment and receive whatever benefits she was entitled to under the benefit plans of the company.

In all of the proceedings whether by interrogatories; whether by examination before trial of the plaintiff; at the trial—there has not been spelled out a single specific act of harrassment or discrimination. There have been no names named; none of the alleged reference to appellant's nationality has been attributed to any of the supervisory personnel, merely to the young girls of the office who are designated "Roman Catholics".

The writer would therefore respectfully request the affirmance of the finding that there has been no discriminatory action or conduct by defendant-appellee placed before the Trial Court or before this Court and that the judgment of the District Court should be affirmed.

Respectfully submitted,

GEORGE A. BURRELL
Attorney for Defendant-Appellee

376—Affidavit of Service by Mail The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United States Court of Appeals For the Second Circuit

Ella I. Meijer-Oosterink,
Plaintiff-Appellant,
against
Esso Standard Eastern, Inc.,
Defendant-Appellee

AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York ss.:

Bernard S. Greenberg, agent for George A. Burrell Appellee, being duly sworn deposes and says that he is the attorney for the above named herein. That he is over 21 years of age, is not a party to the action and resides at 162 East 7th Street, New York, N.Y.

That on the 13th day of August, 1975, he served the within Brief on Behalf of Defendant-Appellee upon Ella I. Meijer-Oosterink the above named Plaintiff-Appellant Pro Se 1500 Strawberry, Apt. 144 Pasadena, Texas 77502

by depositing 3 true copies of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at 90 Church Street, New York, New York

directed to the said Ella I. Meijer-Oosterink at No. 1500 Strawberry, Apt. 144 Pasadena, Texas 77502

that being the address within the state designated by her for that purpose, or the place where she then kept an office, between which places there then was and now is a regular communication by mail.

Sworn to before me, this 13th day of August 1975

Bernard S. Greenberg

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 45[illegible]
Qualified in Delaware County
Commission Expires March 30, 1977